SUPREME COURT, U. S.
FEB 11 1975
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IN THE

# SUPREME COURT OF THE UNITED STATES

..... TERM, 197..

No. 74-1003

FRANK C. RIDENS, MARILYN KECKLER and LARRY WALKER,
Petitioners,

v.

STATE OF ILLINOIS,
Respondent.

## PETITION FOR A WRIT OF CERTIORARI

**To the Supreme Court of the State of Illinois**

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**To the Supreme Court of the State of Illinois**

Petitioners, Frank C. Ridens, Marilyn Keckler, and Larry Walker, do respectfully pray for a Writ of Certiorari to issue to the Supreme Court of the State of Illinois to review its judgment entered November 27, 1974, following the remand in *Ridens, et al. v. Illinois*, 413 U.S. 912 (1973).

### OPINIONS BELOW

The petitioners, Frank C. Ridens and Marilyn Keckler, were charged by complaint on November 28, 1969, with unlawfully selling a number of alleged obscene publications in violation of

the Illinois Obscenity Statute, Illinois Revised Statutes, Chapter 38, § 11-20. On August 12, 1970, the trial court entered judgment for the State and the petitioner Frank C. Ridens was sentenced to serve sixty days in jail and pay a fine in the sum of $4,000, and the petitioner Marilyn Keckler was sentenced to ten days in jail and fined $400.

The petitioner Larry Walker was charged by information dated September 18, 1970, for unlawfully selling alleged obscene publications in violation of a City Ordinance of Moline, Illinois. On January 14, 1971, the petitioner Walker was found guilty as charged and the trial court assessed a fine of $1,000.

The petitioners consolidated their appeals to the Illinois Supreme Court for oral argument. The Illinois Supreme Court affirmed the convictions of the petitioners. *People v. Ridens*, 51 Ill.2d 410, 282 N.E.2d 691 (1972).

A Petition for Certiorari was granted by this Court and a remand order followed. See *Ridens, et al. v. Illinois*, 413 U.S. 912 (1973).

Following the remand, the Illinois Supreme Court on November 27, 1974, once again affirmed the convictions of the petitioners in the written opinion attached hereto as Appendix "A".

## JURISDICTION

1. The date of the opinion and judgment of the Illinois Supreme Court was November 27, 1974. Appendix "A".

2. The statutory provision which confers jurisdiction upon this Court to review the judgment in question by Writ of Certiorari is 28 U.S.C.A., § 1257 (3).

## QUESTIONS PRESENTED FOR REVIEW

1. Whether or not the Illinois Supreme Court erroneously construed the Illinois Obscenity Statute in violation of the petitioners' First and Fourteenth Amendment protections of the Constitution of the United States following this Court's remand order in *Ridens, et al. v. Illinois,* 413 U.S. 912 (1973), by concluding that the statutory definition of prurient interest as "a shameful or morbid interest in nudity, sex or excretion" specifically defined and afforded the petitioners adequate notice of the statutorily proscribed sexual conduct within the meaning of part (b), the patently offensive test, of *Miller v. California,* 413 U.S. 15 (1973)?

2. Whether or not the Illinois Supreme Court's judgment on the obscenity *vel non* of the publications violated the petitioners' First and Fourteenth protections of the Constitution of the United States and the interpretive decisions of this Court?

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First and Fourteenth Amendments to the United States Constitution are set forth in Appendix "B".

The Illinois Obscenity Statute, in pertinent parts, is set forth in Appendix "C".

## STATEMENT OF THE CASE

A report of the trial court proceedings, description of the publications in question, and the constitutional issues raised in the Illinois Supreme Court prior to the decision in *Miller v.*

*California*, 413 U.S. 15 (1973), is reported as *People v. Ridens*, 51 Ill.2d 410, 282 N.E.2d 691 (1972).

A petition for certiorari was granted by this Court on June 25, 1973, vacating and remanding *People v. Ridens*, 51 Ill.2d 410, 282 N.E.2d 691 (1972), with the following order:

> "The petition for a writ of certiorari is granted, the judgment(s) is vacated and the case is remanded for further consideration in light of *Miller v. California*, — U.S. — (1973); *Paris Adult Theatre I v. Slaton*, — U.S. — (1973); *Kaplan v. California*, — U.S. — (1973); *United States v. 12, 200-Ft. Reels of Super 8 mm. Film*, — U.S. — (1973); *United States v. Orito*, — U.S. — (1973); *Heller v. New York*, — U.S. — (1973); *Roaden v. Kentucky*, — U.S. — (1973); and *Alexander v. Virginia*, — U.S. — (1973). Mr. Justice Douglas would grant the petition and reverse the judgment(s). See *Miller v. California, ante* (dissenting opinion of Douglas, J.). Mr. Justice Brennan, joined by Mr. Justice Stewart and Mr. Justice Marshall, would grant the petition, vacate the judgment(s) and remand the case for further proceedings not inconsistent with his dissent in *Paris Adult Theater I v. Slaton, ante*. See *Miller v. California, ante* (dissenting opinion of Brennan, J.)."
>
> See *Ridens, et al. v. Illinois*, 413 U.S. 912 (1973).

On November 27, 1974, the Illinois Supreme Court held, with Justice Davis dissenting, that the Illinois Obscenity Statute, Illinois Revised Statutes, Chapter 38, § 11-20, was constitutional in light of *Miller v. California*. That opinion is attached and incorporated herein at Appendix "A".

The publications held obscene in the Illinois Supreme Court have been lodged with this Court with the filing of this petition for Writ of Certiorari.

## HOW FEDERAL QUESTIONS WERE PRESENTED

The petitioners have consistently maintained throughout the trial and appellate proceedings that the statute and ordinance in question are impermissibly vague and uncertain and that the publications in question may not be held obscene when viewed in the perspective of the First and Fourteenth Amendments to the United States Constitution, as well as decisions of this Court. These federal questions were noted as raised by the petitioners in both of the Illinois Supreme Court opinions. See *People v. Ridens, et al.*, 51 Ill.2d 410, 412, 417, 282 N.E.2d 691 (1972), and *People v. Ridens, et al.*, 59 Ill.2d 362, 365-66, — N.E.2d — (11/27/74), Appendix "A".

Both of the federal questions raised throughout the trial and appellate proceedings have been resolved adversely to the petitioners.

## REASONS FOR GRANTING THE WRIT AND ARGUMENT AMPLIFYING SAME

### I

**The Illinois Supreme Court's Construction of the Illinois Obscenity Statute Erroneously Failed to Meet the Specificity Requirement Mandated in the Patently Offensive Test, Part (B), of MILLER v. CALIFORNIA, 413 U.S. 15 (1973), in Violation of the Petitioners' First and Fourteenth Amendment Protections of the Constitution of the United States.**

When the petitioners were charged in 1969 and 1970 with selling obscene materials, the Illinois Obscenity Statute, Chapter 38, § 11-20, defined the obscene as:

> "A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters."

The Illinois Supreme Court by judicial construction supplemented the statutory definition with a third element, "utterly without any redeeming social value", as expressed in *Memoirs v. Massachusetts*, 383 U.S. 413, 418 (1966). *People v. Ridens*, 51 Ill.2d 410, 414 (1972).

The critical issue to be resolved in the remand order in *Ridens, et al. v. Illinois*, 413 U.S. 912 (1973), was whether or not the Illinois Obscenity Statute was constitutional within the vagueness considerations expressed in *Miller v. California*, 413 U.S. 15, part (b), the patently offensive test. The majority opinion in *Miller* confined the permissible scope of regulation of sexually oriented materials to state statutes that *specifically define* the proscribed sexual conduct. The specificity requirement is stated in part (b) of *Miller* as follows:

> "[W]hether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law."

The Illinois Obscenity Statute, as implicitly conceded by the majority opinion below, had never been authoritatively construed by the Illinois Supreme Court. The dissenting opinion of Justice Davis expressly observed that the statute had never been authoritatively construed prior to the November 27, 1974 opinion. *People v. Ridens*, 59 Ill.2d at 378, Appendix A, pp. A-18-A-19. The majority opinion below did not attempt to authoritatively construe the statute by reference to prior reported Illinois Supreme Court decisions. Instead, the Illinois Supreme Court held that the statute on its face precluded the vagueness attack advanced by the petitioners under part (b) of *Miller*.

In resolving the vagueness issue against the petitioners, the Court stated:

> "We consider next whether the obscenity statute is impermissibly vague. Although not phrased in the exact language of *Miller*, the basic essential element of the statutory offense is that the material 'appeal to the prurient interest.' The statute specifically includes within the scope of 'the prurient interest' a 'shameful or morbid interest in nudity, sex or excretion.' "
>
> *People v. Ridens, et al.*, 59 Ill.2d at 371, — N.E.2d —, A. p. A-11.

The opinion then proceeded to adopt the rationale of *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (involving an "anti-noise" ordinance) and *People v. Raby*, 40 Ill.2d 392, 240 N.E. 2d 595 (1968), involving a disorderly conduct statute) to conclude that the statutory definition of prurient interest, a shameful or morbid interest in nudity, sex or excretion, complies with the specificity requirement of part (b) of *Miller*.

Despite the unequivocal mandate in *Miller* that obscenity laws must be precisely drafted to give adequate notice of the proscribed sexual conduct, the Illinois Supreme Court opinion concluded:

> " 'The legislature deliberately chose to frame the provision in general terms, prompted by the futility of an effort to anticipate and enumerate all of the methods of disrupting public order that fertile minds might devise.' Considered in light of *Grayned* and *Raby* we do not find the statutory definition of obscenity to be unconstitutionally vague."

In *Hamling v. United States*, — U.S. — (1974), this Court rejected the defendant's *Miller*-based vagueness argument addressed to 18 U.S.C. 1461. This Court reviewed prior United States Supreme Court decisions that had construed 18 U.S.C. 1461 and concluded that there had been on existing authoritative construction of the statute. *Hamling v. U.S.*, — U.S. —, 94 S.Ct. 2887 at 2905 (1974). However, it is emphasized that the petitioners' convictions were affirmed by the Illinois Supreme Court, not by an authoritative judicial construction as in *Hamling*, but solely upon the reasoning that the statute was self-defining in articulating the proscribed sexual *conduct* to-wit: "a shameful or morbid interest in nudity, sex or excretion."

The words "nudity", "sex" or "excretion", standing alone, can hardly be argued to comply with part (b), the patently offensive, test of *Miller*. "Sex" and "obscenity" are not synonymous. *Roth v. U.S.*, 354 U.S. 476 at 487 (1957). Likewise, it is palpably inaccurate to assume, as the Illinois Supreme Court has, that the adjectives "shameful" or "morbid" comply with the specificity requirement of *Miller*, part (b).

The Illinois Supreme Court incorrectly applied the statutory definition of prurient interest (part [a] of *Miller*) as the "sexual conduct specifically defined by the applicable state law" to save the glaring vagueness of the statute when viewed within the

guidelines of *Miller*, part (b). *Miller* directs specific definition of sexual conduct under part (b), not under part (a). This subsumption by the Illinois Supreme Court fails to grasp the clear mandate in *Miller* that the patently offensive conduct proscribed by the applicable state law may not be phrased in such general terms as "shameful" or "morbid."

The primary evil of notice and vagueness existing in the Illinois Obscenity Statute at the time of the petitioners' arrests cannot now be cured by a retroactive judicial construction of the significance of "prurient interest" to redeem the absence of any definition in the statute of "patently offensive" sexual conduct. *Bouie v. City of Columbia*, 378 U.S. 347 (1964).

Other jurisdictions with obscenity statutes similar to Illinois have held them unconstitutionally vague in light of part (b) of *Miller*. *State of Iowa v. Wedelstedt, et al.*, 213 N.W.2d 652 (1973); *McCright v. Olson and Garaas*, 367 F.Supp. 937 (N.D.D.C., three-judge, 1973); *Commonwealth v. Horton*, 310 N.E.2d 316 (Mass., 1974); *Art Theatre Guild, Inc. v. State*, 510 S.W.2d 258 (Tenn., 1974); *State of Louisiana v. Shreveport News Agency, Inc.*, 287 So.2d 464 (1973); *Mohney v. Indiana*, 300 N.E.2d 66 (1973); *Stroud v. Indiana*, 300 N.E.2d 100 (1973).

The reasoning of the Illinois Supreme Court that the statutory definition of prurient interest, a shameful or morbid interest in nudity, sex or excretion, removed any vagueness objection under part (b) of *Miller*, violates the petitioners' First and Fourteenth Amendment protections. The Court's ruling fails to objectively define what conduct is sought to be criminally proscribed in disregard of the notice requirements of the Due Process clause of the Fourteenth Amendment. *U.S. v. Harriss*, 347 U.S. 612, 617 (1954). Because of its failure to comply with the First Amendment standards, as specifically mandated in part (b) of *Miller*, the decision of the Illinois Supreme Court on the remand must fall.

## II

**Certiorari Should Be Granted for the Reason That the Materials Held to Be Obscene by the Illinois Supreme Court Are, as a Matter of Law, Constitutionally Protected When Viewed in the Perspective of REDRUP v. NEW YORK, 386 U.S. 767 (1967), and Its Progeny: Specifically, WIENER v. CALIFORNIA, 404 U.S. 988 (1971), and BURGIN v. SOUTH CAROLINA, 404 U.S. 806 (1971).**

The petitioners were charged in obscenity complaints dated November 28, 1969 and September 18, 1970. Now, some five years after the petitioners were arrested they have been caught in a period of transition in this Court regarding the extent of First Amendment protection that will be extended to sexually oriented materials.

In *Miller v. California*, 413 U.S. at 22, this Court observed:

> "Apart from the initial formulation in the *Roth* case, no majority of the Court has at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States' police power. See e.g., Redrup v. New York, 386 U.S. 767, 770-771, 87 S.Ct. 1414, 1415-1416, 18 L.Ed.2d 515 (1967). We have seen 'a variety of views among the members of the Court unmatched in any other course of constitutional adjudication [footnote omitted].' Interstate Circuit, Inc. v. Dallas, supra, 390 U.S. at 704-705, 88 S.Ct. at 1314 (1968) (Harlan, J., concurring and dissenting)."

As noted in footnote 3 of the *Miller* decision, the *Redrup per curiam* disposition of lower court obscenity convictions resulted in thirty one (31) summary reversals.

The decision in *Miller* was the first time since *Roth v. United States*, 354 U.S. 476 (1957), that a single majority view of this

Court has been able to agree on concrete guidelines regarding the forms of expression proscribed by the First Amendment. Although the casual practice of *Redrup v. New York, supra,* was abandoned in *Miller,* the petitioners are entitled to the favorable judicial construction that has been placed upon First Amendment freedoms in the *Redrup* reversals prior to *Miller.* See *Bouie v. City of Columbia,* 376 U.S. 347 (1964).

Whatever esoteric guidelines were employed in judging the obscenity *vel non* of materials under *Redrup, supra,* and its progeny, an independent constitutional judicial review of the publications in the case at bar will reveal that there is no distinction in sexual candor between them and those publications held protected in *Wiener v. California,* 404 U.S. 988 (1971), and *Burgin v. South Carolina,* 404 U.S. 806 (1971). The petitioners were arrested in 1969 and 1970 at a time when the *per curiam* summary reversals of *Redrup* were protecting the type of sexual candor portrayed in the magazines instanter.

In *Wiener v. California, supra,* this Court extended First Amendment protection to magazines entitled "Psychedelic," "The Ballers," "My-O-My" and other publications, as well as certain films. Those publications, as well as "Togetherness" held protected in *Burgin v. South Carolina, supra,* have been lodged with the Clerk of this Court with the filing of this Petition for Certiorari.

The petitioners respectfully submit that the publications in the case at bar are entitled to the same independent constitutional judicial review that this Court extended to the film "Carnal Knowledge" in *Jenkins v. Georgia,* — U.S. —, 94 S.Ct. 2750 (1974).

In the light of the requirements of the First and Fourteenth Amendments and the interpretive decisions of this Court in *Wiener* and *Burgin* with respect to magazines indistinguishable

in content from the magazines herein, the judgment of the Illinois Supreme Court imposing fines and imprisonment upon the petitioners cannot stand.

## CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinions of the Supreme Court of the State of Illinois.

Respectfully submitted

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## APPENDIX A

(Nos. 43974, 44449 cons.—Judgments affirmed)

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee v. FRANK C. RIDENS, *et al.*, Appellants—THE CITY OF MOLINE, Appellee v. LARRY WALKER, Appellant.

*Opinion filed November 27, 1974*

1. CRIMINAL LAW—*permissible scope of statutes regulating obscene materials enunciated in Miller v. California.* The permissible scope of State statutes regulating obscene materials, as prescribed by *Miller v. California* (1974), 412 U.S. 15, is confined to works that depict or describe specifically defined sexual conduct, offenses being limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value. (Pp. 366-67.)

2. CONSTITUTIONAL LAW—*when a law is void for vagueness—due process.* It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined, and the test is whether or not a person of ordinary intelligence would be given fair notice that his contemplated conduct is forbidden by the statute, for no man can be held criminally responsible for conduct which he could not reasonably understand to be proscribed. (Pp. 369-70.)

3. SAME—*when a statute is void for overbreadth—due process.* A statute which may not be void for vagueness may be void for overbreadth if it offends the constitutional principle that a governmental purpose to control or prevent activities constitutionally subject to State regulation may not be

achieved by means which sweep so broadly as to invade the area of protected freedoms. (P. 370.)

4. CRIMINAL LAW—*the Illinois obscenity statute applies statewide standards to determine if a work is obscene.* The constitutional requirement that an obscenity statute as written or authoritatively construed define, with sufficient specificity, the "community" by whose contemporary standards the allegedly obscene material must be tested to determine whether the average person applying those standards would find that the work, taken as a whole, appeals to the prurient interest is satisfied by the Illinois obscenity statute, which has been held to contemplate the application of a statewide standard. (Pp. 370-71.)

5. SAME—*the Illinois obscenity statute is not impermissibly vague.* The Illinois obscenity statute, which requires that the material to be proscribed "appeal to the prurient interest," including a "shameful or morbid interest in nudity, sex or excretion," is not impermissibly vague, for a statute designed to regulate many types of activities must frequently be couched in general terms, and when it is clear what the statute as a whole prohibits, the fact that the words are marked by flexibility and reasonable breadth, rather than meticulous specificity, does not render it unconstitutionally vague. (Pp. 371-72.)

6. CONSTITUTIONAL LAW—*a statute is void for overbreadth if it goes substantially beyond its legitimate sweep—obscenity.* In order that a statute be held overbroad, the overbreadth must not only be real, but be substantial as well, judged in relation to the statute's plainly legitimate sweep, and judged by that standard, the Illinois obscenity statute and the Moline obscenity ordinance are not impermissibly overbroad. (P. 372.)

7. CRIMINAL LAW—*the Illinois obscenity statute has a three-part obscenity test.* The Illinois obscenity statute, as con-

strued, contains a three-part test to determine if a work is obscene: (a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes sexual conduct in a patently offensive way, and (c) whether the work is utterly without redeeming social value, the latter being a less restrictive requirement than that of *Miller v. California* that, to be obscene, the work, taken as a whole, must lack serious literary, artistic, political, or scientific value. (P. 373.)

8. SAME—*in obscenity cases the reviewing court makes an independent constitutional judgment on the facts of each case.* In obscenity cases, as in all others involving rights derived from the first amendment guarantees of free expression, a reviewing court cannot avoid making an independent constitutional judgment on the facts of each case as to whether the material involved is constitutionally protected. (Pp. 373-74.)

9. SAME—*new construction of criminal statute may be retroactively applied if not less favorable to defendants—obscenity.* The Illinois obscenity statute and Moline obscenity ordinance, construed as complying with the tests of *Miller v. California* (1974), 413 U.S. 15, may be applied retroactively, for to do so does not render their construction less favorable to defendants than would have been the case had they been construed under the former standards of *Memoirs v. Massachusetts* (1966), 383 U.S. 413. (Pp. 374-75.)

DAVIS, J., dissenting.

On remand from the United States Supreme Court.

Donald M. Reno, Jr., of Reno, O'Byrne & Kepley, of Champaign, for appellants.

William J. Scott, Attorney General, of Springfield, and Philip G. Reinhard, State's Attorney, of Rockford (James B. Zagel and Raymond McKoski, Assistant Attorneys General, of Chicago, of counsel), for the People.

MR. JUSTICE GOLDENHERSH delivered the opinion of the court:

Defendants, Frank C. Ridens and Marilyn Keckler, a/k/a Norma Keckler, appealed to this court from judgments of the circuit court of Winnebago County entered upon their being found guilty of obscenity (Ill. Rev. Stat. 1969, ch. 38, par. 11-20). Defendant Larry Walker appealed from the judgment of the circuit court of Rock Island County which found him guilty of violating the obscenity ordinance of the City of Moline. The cases were consolidated for argument and opinion, and the judgments were affirmed. (*People v. Ridens*, 51 Ill.2d 410.) The Supreme Court of the United States granted *certiorari*, vacated the judgment of this court, and remanded the cause "for further consideration in light of *Miller v. California*, [413 U.S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 2607] * * *." (413 U.S. 912, 37 L. Ed. 2d 1030, 93 S. Ct. 3046.) On remand we ordered the filing of supplemental briefs "limited exclusively to the constitutionality of Ill. Rev. Stat. (1969), Ch. 38, par. 11-20, in light of the judgment of the United States Supreme Court in *Ridens, et al. v. Illinois*, 413 U.S. 912, 93 S. Ct. 3046 (1973), and whether or not the appellants' convictions should be affirmed after the remand." The facts are adequately set forth in our earlier opinion and will not be restated here.

In two separate complaints, defendant Ridens, owner of two stores in Rockford, and defendant Keckler, his employee, were charged under the obscenity statute with the sale of allegedly obscene magazines. The circuit court found defendants guilty, fined them, and imposed jail sentences.

Defendant Walker, in two separate complaints, was charged under the Moline obscenity ordinance with the sale of obscene magazines. In a bench trial he was found guilty and fined.

Defendants contend first that the obscenity statute and the Moline obscenity ordinance are overbroad and vague and violate defendants' rights under the first and fourteenth amendments to the Constitution of the United States. The People contend that, as "heretofore authoritatively construed," the obscenity statute, as required by *Miller v. California*, "defines with particularity the kinds of specific sexual conduct which can be found obscene." The People argue alternatively that if this court finds that the obscenity statute "has not been previously construed to incorporate the *Miller* standard, the Court can and should now" so construe it.

In *Miller*, the Supreme Court said:

> "* * * State statutes designed to regulate obscene materials must be carefully limited. See *Interstate Circuit, Inc. v. Dallas, supra*, [390 U.S. 676,] at 682-685, [20 L. Ed. 2d 225, 230-2, 88 S. Ct. 1298, 1302-5 (1968)]. As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.
>
> The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, *Kois v. Wisconsin, supra*, [408 U.S. 229,] at 230, [33 L. Ed. 2d 312, 315, 92

S. Ct. 2245, 2246 (1972),] quoting *Roth v. United States, supra,* [354 U.S. 476,] at 489, [1 L. Ed. 2d 1498, 1509, 77 S. Ct. 1304, 1311 (1957),] (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. * * *

We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion, *supra*:

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Miller v. California,* 413 U.S. 15, 23-5, 37 L. Ed. 2d 419, 430-1, 93 S. Ct. 2607, 2614-15.

In pertinent part the Illinois obscenity statute provides:

"(a) Elements of the Offense.

A person commits obscenity when, with knowledge of the nature or content thereof, or recklessly failing to exercise reasonable inspection which would have disclosed the nature or content thereof, he:

(1) Sells, delivers or provides, or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other representation or embodiment of the obscene; or

* * *

(3) Publishes, exhibits or otherwise makes available anything obscene; or

* * *

(5) Creates, buys, procures or possesses obscene matter or material with intent to disseminate it in violation of this Section, or of the penal laws or regulations of any other jurisdiction; or

(6) Advertises or otherwise promotes the sale of material represented or held out by him to be obscene, whether or not it is obscene.

(b) Obscene Defined.

A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. A thing is obscene even though the obscenity is latent, as in the case of undeveloped photographs.

(c) Interpretation of Evidence.

Obscenity shall be judged with reference to ordinary adults, except that it shall be judged with reference to children or other specially susceptible audiences if it appears from the character of the material or the circumstances of its dissemination to be specially designed for or directed to such an audience.

Where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that material is being commercially exploited for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

In any prosecution for an offense under this Section evidence shall be admissible to show:

(1) The character of the audience for which the material was designed or to which it was directed;

(2) What the predominant appeal of the material would be for ordinary adults or a special audience, and what effect, if any, it would probably have on the behavior of such people;

(3) The artistic, literary, scientific, educational or other merits of the material, or absence thereof;

(4) The degree, if any, of public acceptance of the material in this State;

(5) Appeal to prurient interest, or absence thereof, in advertising or other promotion of the material;

(6) Purpose of the author, creator, publisher or disseminator."

The Moline ordinance in pertinent part provides that a person commits obscenity when within the City of Moline he sells, offers or attempts to sell, distributes, gives away, offers to or attempts to give away prints or publishes an obscene book, magazine, pamphlet, paper, photograph, drawing, motion picture, film, phonograph record, film strip or slide.

"Section 2. A thing is obscene for purposes of this Ordinance when to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest; that is,

a) That the dominant theme of the material taken as a whole appeals to a prurient interest in sex, and

b) The material is patently offensive because it affronts contemporary community standards relating to the description or representation of the sexual nature, and

c) The material is utterly without redeeming social value."

"It is a basic principle of due process that 'An enactment is void for vagueness if its prohibitions are not clearly defined.' " *Grayned v. City of Rockford*, 408 U.S. 104, 108, 33 L. Ed. 2d 222, 227, 92 S. Ct. 2294, 2298.

"The basic principle that a criminal statute must give fair warning of the conduct that it makes a crime has often been recognized by this Court. As was said in *United States v. Harriss*, 347 U.S. 612, 617, [98 L. Ed. 989, 996, 74 S. Ct. 808, 812]

> 'The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.'

Thus we have struck down a state criminal statute under the Due Process Clause where it was not 'sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties.' *Connally v. General Const. Co.*, 269 U.S. 385, 391, [70 L. Ed. 322, 328, 46 S. Ct. 126, 127]. We have recognized in such cases that 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law,' *ibid.*, and that 'No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.' *Lanzetta v. New Jersey*, 306 U.S. 451, 453, [83 L. Ed. 888, 890, 59 S. Ct. 618, 619]."

*Bouie v. City of Columbia,* 378 U.S. 347, 350-1, 12 L. Ed. 2d 894, 898, 84 S. Ct. 1697, 1701.

A statute which may be lacking in neither clarity nor precision is void for overbreadth if it offends the constitutional principle "that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. See [*NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 463-464, 2 L. Ed. 2d 1488, 1500-1501, 78 S. Ct. 1163, 1172-1173.] '* * * [T]he power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.' *Cantwell v. Connecticut,* 310 U.S. 296, 304, [84 L. Ed. 1213, 1218, 60 S. Ct. 900, 903.] '* * * [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' " *NAACP v. Alabama ex rel. Flowers,* 377 U.S. 288, 307-308, 12 L. Ed 2d 325, 338, 84 S. Ct. 1302, 1314.

Against this background we must determine whether the obscenity statute withstands the charges of vagueness and overbreadth. We consider first whether the statute as written or "authoritatively construed" defines, with sufficient specificity, the "community" by whose contemporary standards the allegedly obscene material must be tested to determine whether "the average person applying those standards, 'would find that the work taken as a whole appeals to the prurient interest.' It is clear that the States are free to choose to define the 'community' in precise geographic terms (*Jenkins v. Georgia,* —U.S.—, 41 L. Ed. 2d 642, 94 S. Ct. 2750, 2753), and this Illinois has done. In *People v. Butler,* 49 Ill. 2d 435, 438, we held that 'the statute [section 11-20 of the Criminal Code of 1961] contemplates the application of a statewide standard' * * *."

We consider next whether the obscenity statute is impermissibly vague. Although not phrased in the exact language of *Miller*, the basic essential element of the statutory offense is that the material "appeal to the prurient interest." The statute specifically includes within the scope of "the prurient interest" a "shameful or morbid interest in nudity, sex or excretion."

A statute or ordinance designed to regulate many types of activities must frequently be couched in general terms. In rejecting the contention that the "anti-noise" ordinance of the city of Rockford was impermissibly vague and upholding its validity, the United States Supreme Court said: "Condemned to the use of words, we can never expect mathematical certainty from our language. The words of the Rockford ordinance are marked by 'flexibility and reasonable breadth, rather than meticulous specificity,' *Esteban v. Central Missouri State College*, 415 F.2d 1077, 1088 (CA8 1969) (Blackmun, J.), cert. denied, 398 U.S. 965, [26 L. Ed. 2d 548, 90 S. Ct. 2169] (1970), but we think it is clear what the ordinance as a whole prohibits." *Grayned v. City of Rockford*, 408 U.S. 104, 110, 33 L. Ed. 2d 222, 228-229, 92 S. Ct. 2294, 2300.

In *People v. Raby*, 40 Ill.2d 392, in rejecting the contention that sections 26-1(a) and 31-1 of the Criminal Code (Ill. Rev. Stat. 1967, ch. 38, pars. 26-1(a) and 31-1) were invalid by reason of vagueness and overbreadth, this court said at page 396: "It is true that section 26-1(a) does not attempt to particularize all of the myriad kinds of conduct that may fall within the statute. The legislature deliberately chose to frame the provision in general terms, prompted by the futility of an effort to anticipate and enumerate all of the methods of disrupting public order that fertile minds might devise." Considered in the light of *Grayned* and *Raby* we do not find the statutory definition of obscenity to be unconstitutionally vague.

We consider next defendant's contention that the statute is overly broad. In order that a statute be held overbroad the over-

breadth "must not only be real, but subtantial as well, judged in relation to the statute's plainly legitimate sweep." (*Broadrick v. Oklahoma*, 413 U.S. 601, 615, 37 L. Ed. 2d 830, 842, 93 S. Ct. 2908, 2918.) We do not find section 11-20 to be overbroad.

What we have said concerning the alleged vagueness and overbreadth of the obscenity statute is applicable to the Moline obscenity ordinance, and we find it to be neither impermissibly vague nor overbroad.

We have previously construed both section 11-20 of the Criminal Code (*People v. Riden*, 51 Ill.2d 410) and the Moline obscenity ordinance (*City of Moline v. Walker*, 49 Ill.2d 392) to provide the same test of obscenity as are found in *Roth v. United States*, 354 U.S. 476, 1 L. Ed. 2d 1498, 77 S. Ct. 1304. Both the statute and ordinance, as written, are framed in the terms of *Memoirs v. Massachusetts*, 383 U.S. 413, 16 L. Ed. 2d 1, 86 S. Ct. 975, in which the Supreme Court said: "We defined obscenity in *Roth* in the following terms: '[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.' 354 U.S., at 489, [1 L. Ed. 2d at 1509, 77 S. Ct. at 1311]. Under this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters, and (c) the material is utterly without redeeming social value." (383 U.S. 413, 418, 16 L. Ed. 2d 1, 5, 86 S. Ct. 975, 977.) We need not and do not attempt to analyze the changes from the three-part *Roth-Memoirs* standard effected by the enunciation of the three-part *Miller* standard. It suffices to, and we now construe section 11-20 of the Criminal Code and the Moline obscenity ordinance to incorporate parts (a) and (b) of the *Miller* standards.

Part (c) of the *Miller* standard however presents a situation different from parts (a) and (b). As stated above, section 11-20 and the ordinance are drawn to include the three-part test enunciated in *Memoirs*, part (c) of which provides that to be obscene, the material must be "utterly without redeeming social value." Part (c) of neither the *Memoirs* nor the *Miller* test requires definition, and, indeed, defendants do not contend that these provisions of the statute or ordinance present any problem. Clearly the test of *Miller* is more restrictive than that of *Memoirs* and subjects to regulation matters which under *Memoirs* could not be held to be obscene. The statute and ordinance, however, are to be interpreted in the light of the language which they contain, and insofar as this "basic guideline" of *Miller* is concerned, the test of obscenity is that provided in the statute and ordinance.

In *Jacobellis v. Ohio*, 378 U.S. 184, 190, 12 L. Ed. 2d 793, 799, 84 S. Ct. 1676, 1679, it was stated: "[W]e reaffirm the principle that, in 'obscenity' cases as in all others involving rights derived from the First Amendment guarantees of free expression, this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected." (See also *Cox v. Louisiana*, 379 U.S. 536, 545, 13 L. Ed. 2d 471, 478-479, 85 S. Ct. 453, 459.) In *Jenkins v. Georgia*, — U.S. —, —, 41 L. Ed. 2d 642, 652, 94 S. Ct. 2750, 2756, in a separate opinion, Mr. Justice Brennan said: "After the Court's decision today, there can be no doubt that Miller requires appellate courts—including this Court—to review independently the constitutional fact of obscenity. Moreover, the Court's task is not limited to reviewing a jury finding under part (c) of the *Miller* test that 'the work, taken as a whole, lack[ed] serious literary, artistic, political, or scientific value.' *Miller* also requires independent review of a jury's determination under part (b) of the *Miller* test that 'the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law.' "

It is, of course, unfortunate, that the requisite "making of an independent constitutional judgment" in cases involving obscenity requires so great an expenditure of judicial time. The situation is, however, that except that the contending forces appear to become so much more emotional concerning the issues, obscenity cases present precisely the same problems relating to rights under the First Amendment as do the cases involving peace disturbance and disorderly conduct. In view of the inability of the appellate tribunals to clearly delineate the principles applicable to these latter types of cases it appears that perhaps we bemoan too greatly our inability to more clearly define the permissible scope of regulation of obscenity.

Having determined that the statute is constitutional, we consider next defendants' contention that even if this court were "to authoritatively construe the statute within the meaning of *Miller*" the construction could only be applied prospectively and that "traditional notions of due process would prohibit a retroactive application" of that construction.

Our holding that section 11-20 of the Criminal Code and the Moline obscenity ordinance are construed to incorporate parts (a) and (b) of the *Miller* rather than the *Memoirs* standards may not be applied retroactively if to do so renders their construction less favorable to defendants. (*People v. Patton*, 57 Ill. 2d 43, 48.) In our opinion the changes do not have that effect, and we find no impediment to the retroactive application of the statute and ordinance as now construed.

We turn now to the question whether under the statute and ordinance, as now construed, the magazines are obscene. In our earlier opinion (51 Ill.2d 410, 417) we described the photographs contained in the magazines and we need not do so again. We hold that the magazines are obscene, that their sale violated the statute and ordinance, and the judgments are affirmed.

*Judgments affirmed.*

MR. JUSTICE DAVIS, dissenting:

The majority opinion on remand sets forth the progress of this litigation from the circuit courts of Rock Island and Winnebago Counties, Illinois, to the United States Supreme Court. It holds that section 11-20 of the Criminal Code (Ill. Rev. Stat. 1969, ch. 38, par. 11-20) and section 2 of the Moline obscenity ordinance are constitutional as therein construed; that they incorporate parts (a) and (b) of the *Miller* standards; and further holds that the changes in the standards from *Memoirs* to *Miller* afford no impediment to the retroactive application of the statute and ordinance, as construed. I disagree with the majority view and conclusions.

I would reverse the judgments and hold the enactments in question to be unconstitutional in the light of the pronouncements of *Miller v. California* for the reasons hereinafter stated.

After conviction in the trial court, the Ridens, Keckler and Walker cases were consolidated on appeal in this court, for argument and opinion; the constitutionality of the obscenity enactments was upheld, and the judgments of the conviction were affirmed. (*People v. Ridens* (1972), 51 Ill.2d 410.) However, the United States Supreme Court vacated our judgments, and the cases were remanded to this court for further consideration in the light of *Miller v. California.*

*Miller v. California* (1973), 413 U.S. 15, 24-25, 37 L. Ed. 2d 419, 430-431, 93 S. Ct. 2607, 2614-2615, established the following principles for use in determining whether a work may be considered obscene:

> "As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. *That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken*

*as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.* [Emphasis mine.]

The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, *Kois v. Wisconsin*, [408 U.S. 229, at 230, 33 L. Ed. 2d 312, at 315, 92 S. Ct. 2245, at 2246 (1972)], quoting *Roth v. United States*, [354 U.S. 476, at 489, 1 L. Ed. 2d 1498, at 1509, 77 S. Ct. 1304, at 1311 (1957)]; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. We do not adopt as a constitutional standard the *'utterly* without redeeming social value' test of *Memoirs v. Massachusetts*, [383 U.S. 413, at 419, 16 L. Ed. 2d 1, at 6, 86 S. Ct. 975, at 977 (1966)]; that concept has never commanded the adherence of more than three Justices at one time." See 413 U.S. at 21, 37 L. Ed. 2d at 429, 93 S. Ct. at 2613.

In *Hamling v. United States* (1974), — U.S. —, 41 L. Ed. 2d 590, 94 S. Ct. 2887, the United States Supreme Court held that obscenity defendants whose convictions were on appeal at the time *Miller* was decided must receive the benefits of any constitutional ruling announced therein.

Both the Illinois obscenity statute and Moline ordinance incorporate the *Roth-Memoirs* test, *i.e.*, that the material must be "utterly without redeeming social importance." The *Miller* test seems to reduce the first-amendment protection from that under the *Roth-Memoirs* test, and thereby expand the scope of works or materials which are not subject to regulation, by substituting for it the requirement that the material alleged to be obscene,

taken as a whole, lacks "serious literary, artistic, political, or scientific value."

The defendants herein were tried under the *Roth-Memoirs* standards. (*Roth v. United States* (1957), 354 U.S. 476, 1 L. Ed. 2d 1498, 77 S. Ct. 1304; *Memoirs v. Massachusetts* (1966), 383 U.S. 413, 16 L. Ed. 2d 1, 86 S. Ct. 975). These standards included as part of the tripartite guideline the requirement that the material in question be "utterly without redeeming social importance." Thus, to sustain a determination as to obscenity under *Memoirs*, this criteria would be met only if the matter in question is "utterly without redeeming social importance." Under *Miller*, if there is some social importance, be it artistic, literary, political or scientific, no matter how slight, the material should not be condemned as obscene. See Notes and Comments, *Miller v. California: A Cold Shower for the First Amendment*, 48 St. John's L. Rev. 568 (1974).

Thus, the enactments as drafted and as heretofore construed by this court are more restrictive than the new basic standards or guidelines laid down by the United States Supreme Court in *Miller*, so as to expand the scope of work and materials that are not subject to the first-amendment regulation. *Commonwealth v. Horton* (1974), — Mass. —, 310 N.E.2d 316.

Our decisions herein cited have not construed the enactments in question so as to meet the lesser constitutional requirements of *Miller*.

In considering the subject of obscenity, it is well to note that neither the enactments under consideration, the decisions of this court, nor of the United States Supreme Court, condemn sex or nudity as such, but only works or materials pertaining thereto which appeal to the prurient interest and which are patently offensive.

The question of whether obscenity is within the protection of the first amendment to the United States Constitution, or whether

it should not be so protected, is not at issue. The Supreme Court and this court have regularly and consistently held that traffic in obscene materials lies beyond the limits of first-amendment coverage. See *Miller v. California* (1973), 413 U.S. 15, 21, 23, 37 L. Ed. 2d 419, 428, 430, 93 S. Ct. 2607, 2613, 2614; *Kois v. Wisconsin* (1972), 408 U.S. 229, 230, 33 L. Ed. 2d 312, 314-315, 92 S. Ct. 2245; *United States v. Reidel* (1971), 402 U.S. 351, 353, 28 L. Ed. 2d 813, 816, 91 S. Ct. 1410; *City of Chicago v. Kimmel* (1964), 31 Ill.2d 202, 204; *People of Blue Island v. DeVilbiss* (1968), 41 Ill.2d 135, 142; *People v. Sikora* (1965), 32 Ill.2d 260, 264.

The focus of the defendants' argument was not directed at part (a) of the *Miller* test, but rather at part (b). Simply put, defendants argue that neither obscenity enactment before us sets forth, in a descriptive manner, those forms of sexual conduct that may be deemed patently offensive. The defendants further argue that this court has never construed the Illinois obscenity statute or any related ordinances in a definitive manner so as to meet the requirements of part (b) of *Miller*. Accordingly, defendants conclude that both enactments are void for vagueness and overbreadth. For these and other reasons herein stated, I agree.

Under *Miller*, as I understand it, State statutes and municipal ordinances designed to regulate the depiction or description of sexual conduct or confined to works which depict or describe such conduct, and that conduct must be specifically defined in such enactments, as written or authoritatively construed. The offense must be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way and which, taken as a whole, do not have serious literary, artistic, political or scientific value.

An examination of the enactments in question, which are set forth in the majority opinion, will reveal that they do not meet

this requirement of *Miller*. Additionally, this court had never, until in the majority opinion herein, construed these enactments in a definitive manner so as to meet the *Miller* requirements. Under the *Miller* holding, no one should be subject to prosecution for sale or exposure of obscene materials unless these materials depict or describe patently offensive hardcore sexual conduct.

In *Miller*, the Supreme Court attempted to formulate concrete guidelines to isolate hardcore pornography from expressions protected by the first amendment. The *Miller* guidelines require that the materials and the types of descriptions and representations of sexual conduct to be proscribed be specifically delineated. The required specificity may be accomplished by the language of the legislative enactment itself, or by judicial construction.

A survey of State statutes reveals great variance in their scope. A small number are detailed in the descriptions of proscribed sexual conduct, and more are quite general in their language, but most statutes adopt a middle course which embodies either the *Roth* standard or the *Roth-Memoirs* test. The validity of a broad, general enactment, such as the Illinois obscenity statute or the Moline obscenity ordinance, presents the court with a difficult determination. This type enactment usually provides no definition of obscenity other than the word obscene itself, or the use of synonyms, such as "prurient interest," "patently offensive," "morbid," "lewd," "indecent," or "lascivious." For an enactment to be sustained, the Constitution mandates that it provide adequate notice to persons engaged in the type of conduct that the enactment seeks to proscribe. Failure to give adequate notice is especially distasteful in the area of free speech. *Paris Adult Theatre I v. Slaton* (1973), 413 U.S. 49, 86-87, 37 L. Ed. 2d 446, 93 S. Ct. 2628 (Brennan, J., dissenting).

When at the time of the *Miller* decision, the court remanded more than 60 cases which had jammed its docket, a serious problem of retroactivity arose. Understandably, the due process requirement of fair notice could not be met, since the notice did not exist prior to the commission of the alleged offense. (*Watkins v. United States* (1957), 354 U.S. 178, 208, 1 L. Ed. 2d 1273, 77 S. Ct. 1173.) It appears that in rejecting the *Roth-Memoirs* standards and in establishing the *Miller* guidelines, the court intended that the newly created judicial test would have prospective application only.

The defendants contend that were this court to now construe the obscenity enactments in question in such way as to bring it within the meaning of *Miller*, such construction could not be applied retroactively to them; and that such application of the new *Miller* standards would be comparable to *ex post facto* legislation and would be contrary to due process. I agree. Such retroactive judicial construction has been specifically condemned. In *Bouie v. Columbia* (1964), 378 U.S. 347, 12 L. Ed. 2d 894, 84 S. Ct. 1697, two Negroes refused to leave a booth in the restaurant department of a drugstore, although requested to do so by the store manager. They were convicted of having violated a statute making it a misdemeanor to enter another's land after notice from owner prohibiting such entry. The State court construed the act to cover the conduct of remaining on the premises after being requested to leave. At pages 354 and 355, the court stated: "When a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law 'in its primary sense of an opportunity to be heard and to defend [his] substantive right.' *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 678 [74 L. Ed. 1107, 1112, 50 S. Ct. 451]. When a similarly unforeseeable state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him

of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime. Applicable to either situation is this Court's statement in *Brinkerhoff-Faris, supra,* that 'if the result above stated were attained by an exercise of the State's legislative power, the transgression of the due process clause of the Fourteenth Amendment would be obvious,' and 'The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid * * * state statute.' *Id.* at 679-680 [74 L. Ed. at 1112, 1113]."

In *Rabe v. Washington* (1972), 405 U.S. 313, 31 L. Ed. 2d 258, 92 S. Ct. 993, a drive-in theater manager was convicted of exhibiting an obscene picture with knowledge of its contents. The Supreme Court of Washington affirmed on the ground that while the film was probably not obscene if viewed only by consenting adults, it was obscene in the context of its exhibition because 12 to 15 private residences and a major thoroughfare were within viewing range of the theater's screen. On *certiorari,* the United States Supreme Court reversed, and at page 316 stated:

> "We hold simply that a State may not criminally punish the exhibition at a drive-in theater of a motion picture where the statute, used to support the conviction, has not given fair notice that the location of the exhibition was a vital element of the offense."

When Ridens, Keckler and Walker sold the paperback books under consideration, neither they, nor their respective prosecutors, could have anticipated with any degree of certainty that the books would be found obscene under a yet unarticulated set of standards. Their respective convictions now stand affirmed under standards set forth in *Miller,* which were announced subsequent to their respective alleged criminal acts. A conviction under such circumstance violates their right to due process of

law, because they were not given fair notice that criminal liability was dependent upon the subsequently announced standards. A criminal statute must give fair warning of the conduct that it makes a crime. *United States v. Harriss* (1954), 347 U.S. 612, 617, 98 L. Ed. 989, 996, 74 S. Ct. 808, 812.

Section 11-20(a) of the Illinois obscenity statute lists the elements of the offense of obscenity. It provides that a person commits the offense of obscenity, when with knowledge of the nature or content thereof, or recklessly failing to exercise reasonable inspection which would have disclosed the nature or content thereof, he:

"(1) sells, delivers or provides, or offers or agrees to sell deliver or provide any *obscene* material or other representation or embodiment of the *obscene;* or

(2) Presents or directs an *obscene* play, dance or other performance or participates directly in that portion thereof which makes it *obscene*; or

(3) Publishes, exhibits or otherwise makes available anything *obscene;* or

(4) Performs an *obscene* act or otherwise presents an *obscene* exhibition of his body for gain; or

(5) Creates, buys, procures or possesses *obscene* matter or material with intent to disseminate it in violation of this section, or of the penal laws or regulations of any other jurisdiction; or

(6) Advertises or otherwise promotes the sale of materials represented or held out by him to be *obscene*, whether or not it is *obscene*." (Emphasis mine.)

This part of the statute in general provides that the elements of the offense of obscenity are knowingly dealing in any manner with obscene materials or conduct.

It seems crystal clear that obscenity should not, and cannot meaningfully, be described in terms of itself, "obscene." Such enactment certainly does not specifically depict or describe the sexual conduct or obscene materials which could constitutionally be proscribed under *Miller*. The types of descriptions and representations of sexual conduct to be proscribed must, under *Miller*, be specifically delineated. *Miller* confines the permissible scope of such regulations to works which depict or describe patently offensive hardcore sexual conduct or obscene materials which must be defined by such enactments as written or construed.

While section 11-20(b) defines obscenity as set forth in the majority opinion, in general it states that a thing is obscene if, considered as a whole, its predominant appeal is to the "prurient interest," that is, a "shameful or morbid interest in nudity, sex or excretion," and it goes beyond customary limits of candor in description or representation of such matters. Thus, section 11-20(b) likewise describes obscenity in terms of itself "obscene" or in terms of other adjectives or adjective clauses, such as "prurient interest," "morbid," or "shameful interest" which are in reality synonyms for obscene. However, neither of the obscenity enactments in question define nudity, obscene, or other adjectives or adjective clauses used therein. In the light of the *Miller* standards, I find the Illinois obscenity statute too general, and that it fails to set out, with specificity, the sexual conduct and materials which would be deemed patently offensive. Thus, in my judgment, the Illinois obscenity statute fails to meet the *Miller* guidelines.

The Moline obscenity ordinance, which is likewise included in the majority opinion, reveals the same type of approach in its attempt to depict or describe sexual conduct or materials which it seeks to proscribe. It recites that a thing is obscene "when to the average person, * * * the dominant theme of the material taken as a whole appeals to 'prurient interest' " and

prurient interest in sex. It, too, defines obscenity in terms of itself by the use of synonymous adjectives or adjective clauses.

Such general enactments do not inform persons as to what the State commands or forbids. The ancient doctrine of *nulla poena sine lege*, which provides that there can be no punishment without a specific law defining the conduct to be avoided, finds support in *Miller v. California*. People are entitled to know what they may or may not do under threat of fine or imprisonment. The proscribed conduct should be specifically defined for this reason. The enactments in question furnish but meager guidance in this respect.

The majority opinion upholds the constitutionality of the obscenity enactments under consideration by means of judicial construction.

In *Miller*, the court considered the permissible scope of State regulation of works which depict or describe sexual conduct, and made the following statement: "That conduct must be specifically defined by the applicable state law, as written or authoritatively construed" (413 U.S. at 24, 37 L. Ed. 2d at 430, 93 S. Ct. at 2615), and made the following additional remarks in footnote 6: "See, *e.g.*, Oregon Laws 1971, c. 743, Art. 29, secs. 255-262, and Hawaii Penal Code, Tit. 37, secs. 1210-1216, 1972 Hawaii Session Laws, Act 9, c. 12, pt. II, pp. 126-129, as examples of state laws directed at depiction of defined physical conduct, as opposed to expression. Other state formulations could be equally valid in this respect. In giving the Oregon and Hawaii statutes as examples, we do not wish to be understood as approving of them in all other respects nor as establishing their limits as the extent of state power."

For the purpose of showing the type of specificity which *Miller* approved in a State statute, pertinent portions of the Oregon Revised statutes are set forth as follows:

"OBSCENITY AND RELATED OFFENSES

167.060 Definitions for ORS 167.060 to 167.095. As used in ORS 167.060 to 167.095, unless the context requires otherwise:

(1) 'Advertising purposes' means purposes of propagandizing in connection with the commercial sale of a product or type of product, the commercial offering of a service, or the commercial exhibition of an entertainment.

(2) 'Displays publicly' means the exposing, placing, posting, exhibiting, or in any fashion displaying in any location, whether public or private, an item in such a manner that it may be readly seen and its content or character distinguished by normal unaided vision viewing it from a public thoroughfare, depot or vehicle.

(3) 'Furnishes' means to sell, give, rent, loan or otherwise provide.

(4) 'Minor' means an unmarried person under 18 years of age.

(5) 'Nudity' means uncovered, or less than opaquely covered, post-pubertal human genitals, pubic areas, the post-pubertal human female breast below a point immediately above the top of the areola, or the covered human male genitals in a discernibly turgid state. For purposes of this definition, a female breast is considered uncovered if the nipple only or the nipple and the areola only are covered.

(6) 'Obscene performance' means a play, motion picture, dance, show or other presentation, whether pictured, animated or live, performed before an audience and which in whole or in part depicts or reveals nudity, sexual conduct, sexual excitement or sado-masochistic abuse, or which includes obscenities or explicit verbal descriptions or narrative accounts of sexual conduct.

(7) 'Obscenities' means those slang words currently generally rejected for regular use in mixed society, that are used to refer to genitals, female breasts, sexual conduct or excretory functions or products, either that have no other meaning or that in context are clearly used for their bodily, sexual or excretory meaning.

* * *

(9) 'Sado-masochistic abuse' means flagellation or torture by or upon a person who is nude or clad in undergarments or in revealing or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(10) 'Sexual conduct' means human masturbation, sexual intercourse, or any touching of the genitals, pubic areas or buttocks of the human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent sexual stimulation or gratification.

(11) 'Sexual excitement' means the condition of human male or female genitals or the breasts of the female when in a state of sexual stimulation, or the sensual experiences of humans engaging in or witnessing sexual conduct or nudity. [Oregon Laws and Resolutions 1971, ch. 743, sec. 255.]

167.065 Furnishing obscene materials to minors. (1) A person commits the crime of furnishing obscene materials to minors if, knowing or having good reason to know the character of the material furnished, he furnishes to a minor:

(a) Any picture, photograph, drawing, sculpture, motion picture, film or other visual representation or image of a person or portion of the human body that depicts nudity, sado-masochistic abuse, sexual conduct or sexual excitement; or

(b) Any book, magazine, paperback, pamphlet or other written or printed matter, however reproduced, or any sound recording which contains matter of the nature described in paragraph (a) of this subsection, or obscenities, or explicit verbal descriptions or narrative accounts of sexual conduct, sexual excitement or sado-masochistic abuse.

(2) Furnishing obscene materials to minors is a Class A misdemeanor. Notwithstanding ORS 161.635 and 161.655, a person convicted under this section may be sentenced to pay a fine, fixed by the court, not exceeding $10,000." Ore. Rev. Stat. secs. 167.060, 167.065 (1974).

During the past 15 years the obscenity problem has taken much of the judiciary's time and effort.

Mr. Chief Justice Burger, in writing for the majority of the court, pertinently began the *Miller* opinion with the following words: "This is one of a group of 'obscenity-pornography' cases being reviewed by the court in a reexamination of standards enunciated in earlier cases involving what Mr. Justice Harlan called 'the intractable obscenity problem.' *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 704 [20 L. Ed. 2d 225, 88 S. Ct. 1298]."

The overall circumstances attendant upon the obscenity problem are well described by the title of Walter Gellhorn's John A. Sibley Lecture, *Dirty Books, Disgusting Pictures, and Dreadful Laws,*" 8 Ga. L. Rev. 291 (1974). A classical statement on this subject was made by Mr. Justice Stewart in his concurring opinion in *Jacobellis v. Ohio* (1964), 378 U.S. 184, 197, 12 L. Ed. 2d 793, 84 S. Ct. 1676, where he stated:

"I have reached the conclusion, which I think is confirmed at least by negative implication in the Court's decisions since *Roth* and *Alberts*, that under the First and Fourteenth Amendments criminal laws in this area are

> constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that."

Justices Douglas and Black have been criticized as absolutists, being of the view that expression which is unabridged with action may not be subjected to governmental regulation. In his dissent in *Roth v. United States* (354 U.S. 476), Justice Douglas's position was stated in the following sentence at page 514: "Freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it." Justices Douglas and Black would give the broad sweep of the first admendment full support. The obscenity problem involves censorship—the struggle between attempted social control of materials and conduct alleged to be obscene and the first-amendment concept of freedom of expression. In general, courts have not had signal success in dealing with social problems, *e.g.*, integration, school segregation, bussing and obscenity.

However, in defense of the judiciary, it must be noted that its venture into solving social problems has come about because of the failure of the legislative branch of government to act. The fourteenth amendment was adopted in 1868, and although Congress was given express power to implement the amendment, it took no such action. The social problem of school segregation reached the Supreme Court in 1954, in *Brown v. Board of Education* (1954), 347 U.S. 483, 98 L. Ed. 873, 74 S. Ct. 686, and in *Bolling v. Sharpe* (1954), 347 U.S. 497, 98 L. Ed. 884, 74 S. Ct. 693.

The legislature is better equipped through hearings and other legislative procedures to determine public desires and needs in this sensitive area and to define prohibited conduct with such

specificity so as to proscribe the printing, publishing, the sale or offer of sale, or the display or distribution of materials concerning sexual conduct or activities which can be constitutionally prohibited.

It can define such terms as "prurient interest," "contemporary community standards," "patently offensive," "nudity," "serious literary, artistic, political, or scientific value" and other terms which presently bring serious construction problems before the courts and which tend to force the courts to legislate, even though interstitially.

While I abhor the traffic in hardcore pornography, I do firmly believe that there should be no punishment without a specific law defining the conduct to be proscribed; and that a criminal statute must give fair warning of the conduct that makes it a crime.

## *APPENDIX B*

### First and Fourteenth Amendments, U.S.C.

### FIRST AMENDMENT, CONSTITUTION OF THE UNITED STATES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assembly, and to petition the Government for a redress of grievances.

### FOURTEENTH AMENDMENT, CONSTITUTION OF THE UNITED STATES

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## APPENDIX C

### Illinois Obscenity Statutes

### Illinois Revised Statutes, Chapter 38, § 11-20

"(a) Elements of the Offense.

A person commits obscenity, when with knowledge of the nature or content thereof, or reckless failing to exercise reasonable inspection which would have disclosed the nature of content thereof, he:

(1) Sells, delivers or provides, or offers or agrees, to sell, deliver or provide any obscene writing, picture, record or other representation or embodiment of the obscene; or

* * * * * * *

(3) Publishes, exhibits or otherwise makes available anything obscene; or

* * * * * * *

(5) Creates, buys, procures or possesses obscene matter or material with intent to disseminate it in violation of this Section, or of the penal laws or regulations of any other jurisdiction; or

(6) Advertises or otherwise promotes the sale of material represented or held out by him to be obscene, whether or not it is obscene.

(b) Obscene Defined.

A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation

of such matters. A thing is obscene even though the obscenity is latent, as in the case of undeveloped photographs.

(c) Interpretation of Evidence.

Obscenity shall be judged with reference to ordinary adults, except that it shall be judged with reference to children or other specially susceptible audiences if it appears from the character of the material or the circumstances of its dissemination to be specially designed for or directed to such an audience.

Where circumstances of production, presentation, sale dissemination, distribution, or publicity indicate that material is being commercially exploited for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

In any prosecution for an offense under this Section evidence shall be admissible to show:

(1) The character of the audience for which the material was designed or to which it was directed;

(2) What the predominant appeal of the material would be for ordinary adults or a special audience, and what effect, if any, it would probably have on the behavior of such people;

(3) The artistic, literary, scientific, educational or other merits of the material, or absence thereof;

(4) The degree, if any, of public acceptance of the material in this State;

(5) Appeal to prurient interest, or absence thereof, in advertising or other promotion of the material;

(6) Purpose of the author, creator, publisher or disseminator."